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No. 955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RICHARD HOWARD, a/k/a JOHN W. JONES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Judgment and Opinion of the Court Below	2
Jurisdictional Statement	2
Questions Presented for Review	3
Statutes Involved	3
Statement of the Case	4
Reasons Relied on For Allowance of the Writ	8
1. Was the evidence insufficient to convict the defendant on account of the government's failure to produce the informer, as a witness, to rebut the defendant's testimony that the transaction was between the defendant and the federal agent	8
Conclusion	10
Appendices:	
Appendix A—Opinion	App. 1
Appendix B—Judgment of February 7, 1964	App. 5
Appendix C—Order of Court denying Petition for Rehearing	App. 6
Appendix D—Affidavit of Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit	App. 7

AUTHORITIES

Cases

	PAGE
Lowrey v. United States, 8th Cir. 1942, 128 F. 2d 480	10
Morei v. United States, 6th Cir., 1942, 127 F. 2d 830	9
United States *v.* Di Re, 332 U.S. at page 593	9
Yaw v. United States, 9 Cir. 1955, 228 F. 2d 382	9

Statutes

Title 21, U. S. Code Section 174	2, 3
Narcotic Control Act of 1956:	
Title 26, U. S. Code Section 4705(a)	2, 3
Title 28, U.S. Code 1254 (1)	3

IN THE

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No. 9

RICHARD HOWARD, a/k/a JOHN W. JONES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, Richard Howard, a/k/a John W. Jones, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

On February 7, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of conviction entered in the United States District Court for the Northern District of Illinois, sentencing the appellant to imprisonment for a term of six years, in violation of Section 174, Title 21, U. S. Code and a term of six years in violation of Section 4705(a), Title 26, U. S. Code, both sentences to run concurrently. The Court of Appeals opinion has yet been reported. It is printed herewith as Appendix A.

JURISDICTIONAL STATEMENT.

On a trial without a jury, appellant was convicted upon two counts, in which he was named as defendant, in an indictment consisting of three counts, with a co-defendant, Herman Taylor, who was found not guilty. Count 1, charged the receiving, concealing and facilitating transport and concealment of narcotic drugs, in violation of Title 21 U.S.C. Section 174, as amended by the Narcotic Control Act of 1956; Count 2, charged making a sale to one William H. Turnbou (a federal narcotic agent) in violation of Title 26 U.S.C. Section 4705(a), as amended by the Narcotic Control Act of 1956; and Count 3, charged a conspiring to receive, conceal, etc., a narcotic drug in violation of Title 21 U.S.C. Section 174, as amended by the Narcotic Control Act of 1956. Sentences were order to be concurrent. Appellant was found not guilty as to Count 3.

On appeal to the United States Court of Appeals of the Seventh Circuit, the judgments of conviction were affirmed by an opinion filed on February 7, 1964. (Appendix A)

A petition for rehearing was timely filed and was denied on March 5, 1964. (Appendix B)

The jurisdiction of the Court is invoked under the provisions of Title 28, U.S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Was the evidence insufficient to convict the defendant on account of the Government's failure to produce the informer, as a witness, to rebut the defendant's testimony that the transaction was between the defendant and the informer, and not between the defendant and the Federal Agent.

STATUTES INVOLVED

Title 21, U. S. Code Section 174, as amended by the Narcotic Control Act of 1956.

Title 26, U. S. Code Section 4705(a), as amended by the Narcotic Control Act of 1956.

STATEMENT OF THE CASE.

The defendants Richard Howard also known as John W. Jones and Herman Taylor also known as "Gandi," were indicted by the United States Grand Jury for the Northern District of Illinois, Eastern Division, on three counts, the first count charged that they received, concealed and facilitated the transportation and concealment of a certain narcotic drug; in violation of Section 174, Title 21, United States Code as amended by the Narcotic Control Act of 1956. The second count charged them with a sale to William H. Turnbou; in violation of Section 4705(a), Title 26, United States Code as amended by the Narcotic Control Act of 1956. The third count charged a conspiracy to import a narcotic drug in violation of Section 174, Title 21, United States Code, as amended by the Narcotic Control Act of 1956. Both defendants waived a jury and Richard Howard was found guilty on counts one and two. Herman Taylor was found not guilty. Defendant Howard was sentenced to six years and each count to run concurrently in the custody of the Attorney General. It is from these judgments that this appeal is taken.

William H. Turnbou, a Federal Narcotic Agent was with Ray Saunders, an informer of the Bureau of Narcotics on April 16, 1962. On April 17th he obtained $1200.00 official advance funds from Agent Dayle and about 2:00 p.m. went to the Roberts Motel and rented room 107. He remained there until 3:30 a.m., and Ray Saunders Jr., John Jones and Taylor all entered Room 107. That he place $1.200.00 on the bed for some coke, John Jones picked it up and left. (App. 20) At about 4:00 a.m. Jones appeared and asked for Saunders. Saunders then appeared at the door-

way of Room 107 and Jones handed Saunders a tinfoil package and he handed the package to Agent Turnbou, who later gave the package to Agent Dayle. (App. 21) Saunders resides at 4315 West 18th Street. No knowledge of Saunders' whereabouts came to Agent Turnbou after the 19th of April, 1962, he did not make a search for him. On the evening of April 16, 1962, Turnbou went to Saunders' home and slept there. (App. 24)

Agent Dennis Dayle saw Jones entering a tavern at 1157 West 63rd Street on April 17th, 1962, a short time prior he saw Saunders enter that tavern. Jones left the tavern at 9:30 p.m. Jones entered the tavern at 1:30 a.m. At 2:30 he saw Jones and Taylor join Saunders outside of the pool hall and they entered a red Cadillac driven by Saunders, Jr. He followed them to the Roberts Motel. Jones went through the courtway of the motel and east toward the alleyway. About twenty minutes later Jones returned to Taylor and Saunders. They entered Room 107. Later Saunders and Jones came out. Saunders walked across the street to Roberts Show Lounge while Jones went east. About fifteen minutes later Jones reappeared and returned to Room 107. (App. 25) Later Saunders went to Room 107. Saunders and Jones came out of Room 107 and entered Saunders' car and went to 61st and Stony Island. Dayle knew Saunders since December of 1961. He arrested him and placed charges against him in the Federal Court and those charges are pending in Judge Perry's Court. His case was up a few days ago, and he was not present in court, he is out on bond. (App. 26)

Stipulated that if the chemist were here he would testify that the material in the glassine envelopes is a narcotic. (App. 26)

John W. Jones stated that he was never known under the name of Howard. On April 16, 1963, he was not in a tavern at 1157 West 63rd. He knew Saunders since 1953. Both were in the County Jail in 1955. On April 17, 1962, he was in a tavern at 411 East 63rd Street with Helen Robertson drinking. On or about midnight on the 18th Saunders came with three people. (App. 27) Saunders wanted some coke. He wanted to spend $700.00 and that the money was at the motel. Jones continued drinking and Saunders came back and say I want to do business. Jones got into Helen Robertson's red Corvette and drove to the Roberts Motel and parked in back of the motel. Saunders came out and got in the back seat and started to give Jones the money, who said, "Give it to the girl". She took the money and counts it. She said, "$700.00", and put the money in her brassiere. Jones left with the lady and went to 70th and Kimbark and spent the money. In a hour or two later he parked a block from Roberts Motel and knocked on the door and asked for Saunders. He was told Saunders was across the street. Jones went to the Roberts Lounge and Saunders was entertaining a couple of ladies and three or four fellows drinking. (App. 28) Jones bought a drink and caught Saunders' eye, who wanted the package. Jones suggested to go over to the motel and we crossed the street to the parking lot, where Jones gave Saunders the package. Jones then walked east and Saunders went into Room 107. Jones never discussed with Agent Turnbou that he would purchase narcotics for him for $1,200.00. He never saw Turnbou until he got in court. What he gave Saunders in a brown paper bag was supposed to be cocaine. He gave Frank $700.00, who gave Jones $200.00. Prior to this Jones negotiated with Frank in sums of fifteen and twenty-five dollars numerous times.

He has never been in Saunders' car. He was convicted of white slavery and granted probation in 1956, and also has been arrested in narcotic investigations. At the time he was unemployed. (App. 29)

Helen Robertson knows Jones and Saunders. Midnight of April 18, 1962, she was with Jones at a bar at 411 on 63rd Street. She saw Saunders and three fellows. Saunders talked to Jones. Jones rode her car to the Roberts Motel and parked in the rear. Ray went somewhere and later returned and got in the back of the car and she counted $700.00, that Saunders gave her. Jones and Robertson went to some house and came back and parked at the filling station. Jones got out and later returned alone. They went home. (App. 30)

Jones was her boy friend at the time, but not now. The first time he was informed that she was to testify was Tuesday by Mr. Malony. She counted the money because she was asked to. She gave it to Jones. She has no reason to commit perjury to help Jones. She was not employed at the time, she supports herself as a prostitute. (App. 31)

Donald F. Schnettler, in rebuttal stated that during his observation of Jones, he did not see Jones with a female. He did not see Jones for a period of four hours between 9:30 p.m. and 1:30 a.m.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1.

WAS THE EVIDENCE INSUFFICIENT TO CONVICT THE DEFENDANT ON ACCOUNT OF THE GOVERNMENT'S FAILURE TO PRODUCE THE INFORMER, AS A WITNESS, TO REBUT THE DEFENDANT'S TESTIMONY THAT THE TRANSACTION WAS BETWEEN THE DEFENDANT AND THE FEDERAL AGENT.

William H. Turnbou, a Federal Narcotic Agent stated that the defendant received $1,200.00 from him for narcotics, in a room in the Roberts Motel. (App. 20). He further stated that an informer Saunders was present. That later defendant came into the room with Saunders and gave Saunders a package, who gave it to Agent Turnbou. (App. 21.)

The defendant Jones testified that in a car outside of the motel Saunders gave him $700.00 in the presence of Helen Robertson, who counted the money. Jones later gave Saunders a package in the parking lot outside the motel. (App. 28.) Helen Robertson testified she was present. (App. 30.)

Saunders did not testify, but was termed as a special employee by Agent Turnbou, who further stated that he did not search for Saunders.

The testimony of the witnesses was in conflict as to whether the money for the sale was given to the defendant by the informer or the Federal Agent. Also in conflict was the issue as to whom the defendant delivered the package, to the informer or to the Federal Agent.

The informer Saunders was present in the room when the Federal Agent gave the defendant the money, according to the Federal Agent's version, and was present in the car when he gave the defendant the money, according to the defendant's version. Saunders became a material witness to all the facts of the transactions and should have been called by the Government.

In *United States* v. *Di Re*, 332 U.S. at page 593, the Court observed:

> "Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home in Di Re."

In *Yaw* v. *United States*, 9th Cir. 1955, 228 F.2d 382, the Court said:

> "It is significant that the United States did not produce Peltier as a witness, he having pled guilty and hence his testimony as to when he acquired the cigarettes would not incriminate him. A witness available to the prosecution to maintain its burden of proof which it does not produce or explain why it cannot, is presumed one who would testify against the Government. See Wigmore on Evidence, Sections 286-90."

In *Morei* v. *United States*, 6th Cir., 1942, 127 F. 2d 830, the Court said:

> "It may be observed that the failure of the Government to call Sargent, a most important witness in view of the disputed testimony, was unexplained, and, under the circumstances, every inference and conclusion must weigh against the contention of the Government on this phase of the case."

In *Lowrey* v. *United States*, 8th Cir. 1942, 128 F. 2d 480, the Court said:

> "It is also significant that the testimony of the witness Outler is not denied by the federal officer with whom the agreement is supposed to have been made. That officer was a witness for the government in the court below, and, so far as the record goes, was available to refute Outler's testimony. This testimony was material for, if true, it required suppression of the Government's evidence. In such circumstances the unexplained failure of the government to place the witness Gibson on the stand justifies the inference that his testimony, if presented, would have been unfavorable to the prosecution."

The testimony of the defendant, if it was false, could have been refuted by the informer Saunders. Following the reasoning of the above cited cases the testimony of the defendant would have corroborated the testimony of the defendant, that the transaction was with the informer and not with Agent Turnbou as alleged in the indictment. To preserve the credibility of government agents, as witnesses, in a court of law, Saunders should have been called as a witness.

The defendant's version of the transaction, corroborated by Helen Robertson and the presumption that the missing witness would have given the same version of the transaction as Jones does not leave the government with sufficient evidence to sustain a conviction of the defendant of a sale and possession, as to the agent.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SALVATORE E. ODDO,
Counsel for Petitioner.

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14296 SEPTEMBER TERM, 1963—JANUARY SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD HOWARD, a/k/a JOHN W. JONES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 7, 1964

Before KNOCH and SWYGERT, *Circuit Judges,* and MAJOR, *Senior Circuit Judge.*

KNOCH, *Circuit Judge.* Defendant-appellant, Richard Howard, also known as John W. Jones, and his co-defendant, Herman Taylor, also known as "Gandi," were tried by the District Court without a jury, on a three-count indictment which charged them with: (1) receiving, concealing and facilitating transport and concealment of narcotic drugs, in violation of 21 U. S. C. § 174, as amended by the Narcotic Control Act of 1956; (2) making a sale to one William H. Turnbou (a federal narcotic agent) in violation of 26 U. S. C. § 4705(a), as amended by the Narcotic

Control Act of 1956; and (3) conspiring to receive, conceal, etc., a narcotic drug in violation of 21 U. S. C. § 174, as amended by the Narcotic Control Act of 1956.

The co-defendant, Herman Taylor, was found not guilty. Appellant was found guilty on the first two counts and sentenced to serve six years on each count, the sentences to run concurrently. This appeal followed.

Appellant contends that the evidence was insufficient to support the conviction.

Agent Turnbou testified that on April 18, 1962, at about 3:30 a.m., he was in Room 107, at the Roberts Motel, in Chicago, Illinois, with appellant, his co-defendant, Herman Taylor, and Special Employee Ray Saunders, Jr. Agent Turnbou testified that he said "I want to get two ounces of heroin." Appellant said, "I don't have any heroin, but I can get you some coke for $1,200.' Agent Turnbou said, "Okay," and placed $1200 (in official advance funds obtained from Agent Dennis Dayle) on the bed. He saw appellant pick up the money and leave. Agent Turnbou testified further that in about half an hour, appellant returned to Room 107, and handed Ray Saunders a tinfoil package which the latter promptly gave to Agent Turnbou in the presence of appellant.

It was stipulated that the government's chemist would testify that the substance here involved was cocaine hydrochloride, a narcotic drug.

Agent Dayle testified to having observed appellant's movements, following him to the Roberts Motel, and seeing him enter, leave, return and again leave Room 107 at about the same times indicated in the testimony of Agent Turnbou.

Appellant testified in his own behalf. He gave a different account of the events of that night. The major discrepancy concerned the sale itself. Appellant stated that he sold narcotics to Ray Saunders, Jr., taking the money from him outside the motel, while parked in a car, by having Saunders give the cash to Helen Robertson, who was with him in the car. He said he later went to Room 107 looking for Saunders who was not there, and that he made delivery of the narcotics to Saunders in a parking lot near the motel. He said that he never saw Agent Turnbou until he appeared in court.

Helen Robertson testified that she was with appellant in her automobile and that Saunders paid appellant $700, which, at appellant's direction, was given to her to count. She later gave the $700 to appellant.

Agent Donald F. Schnettler testified that while appellant was under his observation that night, there was no woman with him. He did not see appellant for a period of about four hours between 9:30 p.m. and 1:30 a.m., but did observe him before and after those hours.

In view of the contradiction between the testimony of Agent Turnbou and that of appellant, appellant contends that the failure of the government to call Mr. Saunders, who was allegedly present when appellant picked up the $1200 in Room 107, raises the presumption that his testimony would have been unfavorable to the prosecution.

The issue here was one of credibility. The District Court as the trier of the facts determined the credibility of the witnesses whom he saw and heard. The credibility of the witnesses is not within our province. *U. S. v. Valenti*, 7 Cir., 1962, 309 F. 2d 419, 421; *U. S. v. Frierson*, 7 Cir., 1962, 299 F. 2d 763, 767, cert. den. 371 U. S. 963; *U. S. v. Green*, 7 Cir., 1957, 246 F. 2d 155, 158, cert. den. 355 U. S. 871.

Unlike the missing witnesses in the cases cited by appellant, Ray Saunders, Jr., was not a necessary witness here. Examination of the factual situation in those cases will serve to distinguish them. *Lowrey* v. *U. S.*, 8 Cir., 1942, 128 F. 2d 480; *Morei* v. *U. S.*, 6 Cir., 1952, 127 F. 2d 830; *U. S.* v. *Di Re*, 1948, 332 U. S. 593; *Yaw* v. *U. S.*, 9 Cir., 1955, 228 F. 2d 382.

In the case before us, Agent Turnbou testified that he himself was present when the $1200 was picked up and when the narcotics were brought to Room 107 by appellant. Appellant gave the packet to Saunders, but Saunders immediately passed it to Agent Turnbou in appellant's presence. The government never contended that Saunders was more than a spectator. His testimony was not essential and lack of it gave rise to no presumption that he would contradict the evidence of Agent Turnbou. Faced with the conflict between the testimony of Agent Turnbou and that of appellant and Miss Robertson, the District Court resolved an issue of credibility in favor of the government.

The evidence on the record before us is sufficient to support the conviction. The judgment of the District Court is affirmed.

Affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, February 7, 1964

Before

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. J. EARL MAJOR, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 14296 v.

RICHARD HOWARD, a/k/a JOHN W. JONES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois
Thursday, March 5, 1964

Before

Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. J. EARL MAJOR, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICHARD HOWARD, a/k/a JOHN W. JONES, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14296

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. The appellant's appendix, included in "Appellant's Brief and Appendix", filed in this Court on October 18, 1963.
2. The opinion of this Court filed on February 7, 1964.
3. The judgment of this Court, entered on February 7, 1964.
4. The order, entered by this Court on March 5, 1964, denying the petition for rehearing.

Cause No. 14296

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs.

RICHARD HOWARD, a/k/a JOHN W. JONES, *Defendant-Appellant*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eleventh day of March, A. D. 1964.

(SEAL)

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.
by: *Thomas F. Stauble*, Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 955

RICHARD HOWARD, a/k/a JOHN W. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1964. A petition for rehearing was denied on March 5, 1964. The petition for a writ of certiorari was filed on March 27, 1964. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the evidence supports petitioner's conviction for narcotics offenses.

STATEMENT

In the United States District Court for the Northern District of Illinois, petitioner and codefendant Herman Taylor were tried before the court under an indictment charging them in three counts with (1) transporting a narcotic drug in violation of 21 U.S.C. 174; (2) selling a narcotic drug without a written order form in violation of 26 U.S.C. 4705(a); and (3) conspiring to violate 21 U.S.C. 174 (D.A. 6-8).[1] Petitioner was convicted and sentenced under the first two counts to concurrent terms of six years' imprisonment; he was acquitted under the third count; and codefendant Taylor was acquitted under all counts (D.A. 12-13, 27). The court of appeals affirmed unanimously (Pet. App. 1-4).

The evidence introduced at the trial may be summarized as follows:

William H. Turnbou, a federal narcotics agent, testified that about 3:30 a.m. petitioner, codefendant Taylor and a special employee named Roy Saunders visited a Chicago motel room where Turnbou was stay-

[1] "D.A." refers to petitioner's appendix in the court of appeals.

ing. After Saunders introduced Agent Turnbou as a "fellow from Detroit", Turnbou arranged to purchase $1200 worth of cocaine from petitioner. Petitioner took the money, and while Turnbou and Taylor remained in the room, petitioner left with Saunders (D.A. 20-21). About 4 a.m. petitioner returned alone and said that he would not give anything to Turnbou. However, Saunders appeared as petitioner started to leave, and petitioner handed a tin-foil package to Saunders, who in turn handed the package to Agent Turnbou (D.A. 21). The package was later shown to contain 19.3 grams of the narcotic drug cocaine hydrochloride (D.A. 11, 21, 26).

Petitioner testified that the sale was made to Saunders rather than to Agent Turnbou. According to his version of the events, he was sitting in a tavern with Helen Robertson around midnight when Saunders came in with three friends and asked him to find some cocaine (D.A. 27-28). Some time later he drove to the motel with Miss Robertson in her automobile, a red Corvette, and met Saunders in the parking lot. After Saunders gave $700 to Miss Robertson, she and petitioner drove away, spent the money, and returned with cocaine an hour or two later. Petitioner went to the motel room but was told that Saunders was across the street in a bar (D.A. 28). He spoke to Saunders in the bar, the two walked across the street to the motel parking lot, and there he gave Saunders the cocaine (D.A. 28-29). Helen Robertson's testimony corroborated petitioner's account of the sale (D.A. 30.)

A narcotics agent who had Saunders under observation saw him go from a pool hall to a tavern shortly after midnight. About 1:30 a.m., petitioner entered the same tavern and remained there for ten minutes. A short time later, Saunders returned to the pool hall. About 2:30 a.m. petitioner and Taylor met Saunders outside the pool hall, and the three drove in Saunders' red Cadillac to the motel where agent Turnbou was staying. Petitioner stepped out of the car and walked down an alley behind the motel. Twenty minutes later, he returned and went with Saunders and Taylor to Agent Turnbou's room. After another twenty minutes had passed, petitioner and Saunders left the room—Saunders walking across the street to a bar and petitioner disappearing down the same alley. After having been away some fifteen minutes, petitioner returned to the room and, a few minutes later, Saunders left the bar and also went to the room (D.A. 25). A little later, petitioner and Saunders departed in the latter's Cadillac (D.A. 26).

A third narcotics agent testified that he had petitioner under observation all night except for the period between 9:30 p.m. and 1:30 a.m., and that he never saw petitioner in the company of a woman (D.A. 32). The special employee, Saunders, did not testify.

ARGUMENT

Contrary to petitioner's contention, the testimony of the three narcotics agents provided more than sufficient evidence to support his conviction for selling

cocaine without a written order form to Agent Turnbou, as charged in the second count of the indictment. The fact that petitioner and Helen Robertson testified to a different version of the events—that the sale was to the special employee, Saunders, rather than to Turnbou—only created an issue of credibility which the trier of fact could and did resolve in favor of the government. It is true that the trier of fact, in weighing the evidence, could infer from the government's failure to call Saunders to testify that his evidence would not have been favorable to the government. *E.g.*, *United States* v. *Di Re*, 332 U.S. 581, 593; *United States* v. *Brown*, 236 F. 2d 403, 405-406 (C.A. 2); *Yaw* v. *United States*, 228 F. 2d 382 (C.A. 9); 2 Wigmore, *Evidence*, Sec. 285 (3d ed., 1940); McCormick, *Evidence*, Sec. 249 (1954). However, the inference is not mandatory and may be given such weight as is appropriate in the circumstances. *Ibid.* The failure of Saunders to testify was only one of many factors which the trial judge weighed in assessing the credibility of the witnesses and does not give rise to an issue warranting review on appeal. *United States* v. *Brown*, *supra*, at 406.

In any event, since petitioner was sentenced concurrently, his conviction must be affirmed unless the evidence was insufficient to support the first count as well as the second count of the indictment. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359. Petitioner's testimony that he sold the cocaine to Saunders, rather than to Turnbou, would not constitute a defense to the first count which charged him with transporting narcotics in violation of 21 U.S.C. 174.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

APRIL 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 729075 897